The Court went on to find that on the true construction of the contract entered into between the plaintiff and the defendant it contained an express obligation on the part of the defendant to refund lost or stolen cheques regardless of the plaintiff's own negligence or recklessness in safeguarding the cheques and ordered the defendant to pay the £40,700 as claimed.

In Fellus v. National Westminster Bank [1983] 133 NLJ the plaintiff purhased £800 worth of traveller's cheques. The terms governing the purchase stated that any loss of cheques should be reported to the police and the nearest bank and that 'a refund will be made upon completion of our form of application, providing the cheques were signed but not contersigned and there had been no undue negligence'. The plaintiff did sign the cheques at the time of purchase. A short while later the plaintiff discovered the cheques were missing. He duly reported the loss to the police and the bank. He then claimed for a refund from the bank. The court found no undue negligence on the plaintiff's part and held that the plaintiff was entitled to a refund.

From these two cases it seems clear to me that where the contract of purchase of travellers cheques contains express provision for refund unless the purchaser breaks any of his obligation, he is entitled to be refunded. Where there is no express provision for a refund there would, of necessity, be an implied obligation to refund subject to a discretion to resist a refund.

In the present case on my perusal of the terms and conditions of the purchase and the terms of refunds it seems undoubtedly clear to me that there is an express obligation on the part of the defendant to refund, more so in this case as the lost cheques had not been encashed anywhere nor any attempts made to encash them. On the true construction of the terms of purchase and refund in the present case I hold that there being no evidence of negligence or fraud on the part of the plaintiff he is entitled to a refund. I find that the defence put up has no merits whatsoever and no issues for trial serious or otherwise have been established. Therefore a final judgment is entered for plaintiff as prayed.

KASSIM BIN SULONG & ANOR. AS THE LIQUIDATORS OF 10 COMPANIES

v.

GUTHRIE ESTATES HOLDINGS LTD. & 8 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[ORIGINATING SUMMONS NO. D4-24-262-89]
28 JANUARY 1993

PRACTICE & PROCEDURE: Application to strike out paragraphs in affidavit - Application to strike out exhibits annexed to affidavit - Whether said paragraphs and exhibits scandalous, irrelevant, inadmissible or otherwise oppresive - Application made under O. 41 r. 6 Rules of the High Court 1980 and under inherent jurisdiction of the Court.

The first, eighth and ninth respondents (the applicants) applied for an order that paragraphs 16-18, 21-32, 34-35 and 37-41 of the affidavit of one Lee Chen Wa be struck out and that all the exhibits, bar one, to the said affidavit also be struck out on the grounds that the said paragraphs and exhibits to the said affidavit are scandalous, irrelevant, inadmissible or otherwise oppresive. At the hearing the respondents found paragraph 16 of the affidavit unobjectionable and did not proceed against the said paragraph.

Held:

[1] The whole of the said affidavit should be struck out because the deponent had produced heresay evidence. The deponent had not disclosed the source of the information deposed to in his affidavit and as such the said affidavit did not comply with the requirements of O. 41 r. 5 of the Rules of the High Court 1980 (RHC 1980).

[2] In any event, looking at the paragraphs objected to, paragraph 17 referred to events subsequent to the agreement and it being settled law that a contract could not be construed by reference to the subsequent conduct of the parties, paragraph 17 of the affidavit should be disregarded. When the deponent said in paragraph 18 of the affidavit that he was "advised and verily believed", he had not disclosed the source of his information or the persons who advised him and therefore the averment in paragraph 18 is bad as paragraph 18 contains heresay evidence. Since heresay evidence is

inadmissible and irrelevant in a proceeding other than an interlocutory proceeding paragraph 18 should be struck out as the proceeding herein was not interlocutory but a final matter.

[3] The averment in paragraph 21 contravened O. 41 r. 5 RHC 1980 as it did not contain the personal knowledge of the deponent. In addition evidence of negotiations or of the parties intentions ought not to be received by the Court in construing a written agreement and in the circumstances paragraph 22 which refers to "intention" prior to the execution of the agreements is not relevant to the present case.

[4] Paragraph 23 of the affidavit which refers to a document is heresay evidence as the maker of the document was not called to prove its contents. Paragraphs 24-28 of the affidavit referred to exhibits annexed thereto which exhibits were being used to construe the agreements by implying further terms. In the circumstances paragraphs 24-28 and the documents exhibited thereto should be struck out.

[5] Paragraph 30 of the affidavit contained evidence extrinsic to the two agreements and is inadmissible. The 2nd to 7th respondents argument that paragraphs 29 and 30 contained a contention was not acceptable as an affidavit is not a place for a submission. In paragraph 32 the deponent had not stated the source of the information or source of his "belief" and as such the said paragraph is therefore inadmissible.

[6] Paragraphs 34 and 35 clearly state an opinion of law. It is the function of the Court to decide on a question of law and as such an opinion of law in an affidavit is inadmissible. In the premises paragraphs 34 and 35 of the affidavit should be struck out. Similarly with paragraphs 37-40 of the affidavit which also contain opinions of law. In paragraph 41, the deponent did not say who advised him and what was trhe source of the advice and in the circumstances paragraph 41 should be struck out.

[Orders accordingly].

Cases referred to:
S.K.T. Kulanthayan Chettier v. Koh Liak Phuang [1951] 17 MLJ 149 ***(cit)***
Hari Singh v. Sundaramma l [1965] 2 MLJ 174 ***(foll)***
Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman [1986] 1 MLJ 426 ***(cit)***
James Miller & Partners Ltd. v. Whitworth Street Estates [1970] AC 61 ***(foll)***
Rossage v. Rossage & Ors. ***(refd)***
Prenn v. Simmonds [1971] 1 WLR 1381 ***(foll)***
Codelfa Construction Proprietary Ltd. v. State Rail Authority of New South Wales [1981 - 1982] 149 CLR 337 ***(refd)***
Sim Tien Bee v. Public Prosecutor [1973] 2 MLJ 201 ***(cit)***
Nahar Singh v. Pang Hon Chin [1986] MLJ 141 @ 143 ***(refd)***
Alfred Dunhill & Anor. v. Sunoptic SA & Anor. [1979] FSR 337 ***(refd)***
Development & Commercial Bank Bhd. v. Cheah Theam Swee [Civil Suit No. C2575 of 1984] (Unreported) ***(foll)***
Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors. [1989] 1 MLJ 426 ***(refd)***
Pioneer Shipping Ltd. & Ors. v. BTP Tioxide Ltd. [1982] AC 724 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 41 rr. 5, 6

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 12, pp. 612 and 613
Supreme Court Practice, 1988, Vol. 1, p. 652, para 41/5/1

For the applicants - Grace Lim Poh Geok; M/s. Rashid & Lee
For the 1st, 8th and 9th respondents - James Puthucheary (N. Nadkarni with him); M/s. Skrine & Co.
For the 2nd to 7th respondents - S. Woodhull (Robert Lazar and K.I. Goh with him); M/s. Shearn Delamore & Co.

JUDGMENT

Dr. Zakaria bin Mohd Yatim J:
This is an application by the first, eighth and ninth Respondents (the applicants) for an order in terms of the following prayers:

(1) That paragraphs 16 - 18, 21 - 32, 34 - 35 and 37 - 41 of the affidavit of Lee Chan Wa affirmed on 21 February 1990 (the said affidavit) be struck out;
(2) That all the exhibits to the said affidavit, save and except for "LCW 2A-2-F" be struck out;
(3) That the second to seventh respondents pay the costs of and incidental to the application.

The grounds of the application are that the said paragraphs and exhibits to the said affidavit are scandalous, irrelevant, inadmissible or otherwise oppressive. The application was made under O. 41 r. 6 of the Rules of the High Court and under the inherent jurisdiction of the Court.

Before proceeding to submit on the paragraphs referred to in the application, Mr. James Puthucheary, Counsel for the applicants, referred to paragraph 4 of the said affidavit. Paragraph 4 states:

> 4. The matters deposed to herein are true to the best of my information knowledge and belief from all records made available to me and to transactions with which I have been personally and intimately involved on behalf of KGSB and the 6 Sdn. Bhds.

Mr. Puthucheary submitted that the deponent did not give evidence from his personal knowledge. He cited *S.K.T. Kulanthayan Chettier v. Koh Liak Phuang* [1951] 17 MLJ 149 where it was held that the words "to the best of my knowledge" when referred to the acts of another person must mean "to the best of my knowledge, information and belief." What was deposed to in that case was not within the knowledge of the deponent and therefore without such statement as contained in paragraph 6 of the affidavit of Ramaswamy Pillay the motion showed no cause of action and was accordingly dismissed.

Mr. Purthucheary next referred to *Hari Singh v. Sundarammal* [1965] 2 MLJ 174. In that case it was decided that when knowledge and information and belief were alleged at the same time in an affidavit it was necessary for the defendant to state how much of the allegation was based on personal knowledge and how much on information and belief. In his judgment in that case, MacIntyre J. said at pages 174 and 175 as follows:

> In his affidavit dated 7 December 1964 and filed in support of the application for an attachment before judgment, the plaintiff says, *inter alia*, that the defendant had come to Malaya on a visit pass and that to the best of his knowledge, information and belief she was making arrangements to leave the country for good on 17 December 1964. He further says: 'to the best of my knowledge, information and belief the defendant is negotiating the sale of her interests on this said two pieces of land.'...
>
> In the case of *In re J.L. Young Manufacturing Co. Ltd.*, on an appeal from an order refusing an applicant's claim to rank as a debenture holder based on evidence which consisted mainly of affidavits containing statements on 'information and belief' Lord Alverstone CJ said:
>
> > In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice that in several instances the deponents make statements on their 'information and belief' without saying what the source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on 'information and belief' ought not to be looked at all, not only unless the Court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice.

Supporting this judgment Rigby L.J said:

> I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general - that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief.

Vaughan Williams L.J. went even further and observed:

> With regard to affidavits of the sort before us, it is not quite a sufficient or satisfactory remedy to throw upon the party upon whose behalf such affidavits are put forward the liability of paying the costs of those affidavits.

... In the instant case, however, the plaintiff went one step further and deposed to facts 'to the best of my knowledge, information and belief.' Mr. Vohrah for the plaintiff submitted that the words, 'to the best of my knowledge' would indicate that the plaintiff was personally aware of the facts apart from the facts being confirmed by information and belief.

It would appear that the proper interpretation to be placed on the words, 'to the best of my knowledge, information and belief' is that the knowledge was based on information and belief. In the case of *Quartz Hill Consolidated Gold Mining Company v. Beall* Jessel MR in allowing an appeal from an order on an interlocutory injunction in a libel action said: .

> Now, in this instance, the only witness for the plaintiffs is their secretary, who says not that the circular is untrue, but that the statements in the circular are to

> the best of his knowledge, information, and belief are untrue. He does not shew that he has any knowledge at all on the subject of these statements. He probably as secretary has some knowledge about them, but he does not shew it; and where an affidavit is made upon information and belief the rules of the Court require that the deponent should state what are the grounds of his information and belief, and that he does not do, he only says that they are untrue to the best of his knowledge, information, and belief, not saying what the best of his knowledge is, and it may be nothing at all. There is, therefore, no evidence as to the untruth of the allegations in the circular.

In the case of *Madan Theatres Ltd. v. Hari Das*, in setting aside an order of attachment before judgment, the appeal court held that:

> the affirmation attached to the affidavit is wholly insufficient. It does not give any details as to what portion of the affidavit was based upon the personal knowledge of the deponent and what allegations were founded upon information and whether he believed it to be true.

It would therefore appear when knowledge and information and belief are alleged at the same time, it is necessary for the deponent to state how much of the allegation is based on personal knowledge and how much on information and belief.

Mr. Puthucheary submitted that on this ground alone the Court was entitled to strike out the whole affidavit because the deponent had produced heresay evidence. The deponent had not disclosed who those people were. He added that the deponent had not disclosed the source of the information. He submitted that it was necessary that the deponent must disclose the source of the information in the affidavit. In support of his submission he referred to a passage in *Hari Singh's* case at page 175 where MacIntyre J. said:

> ...the point made by Mr. Dharmanda is that the order was made on insufficient or no evidence at all as the facts deposed to in the affidavit of the plaintiff are made on information and belief without disclosing the source of the information as required under r. 3 of O. 38 of the Rules of the Supreme Court...Lord Alvestone CJ. said:
>
> > ... In my opinion so-called evidence on information and belief ought not to be looked at all, not only unless the Court can ascertain the source of the information and belief ...

He also cited *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman* [1986] 1 MLJ 426 where the Court said at page 428 of the judgment as follows:

> Paragraph 4, therefore, did not comply with the requirements of O. 41 r. 5, which states:
>
> (1) ... an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
> (2) As affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
>
> The Court, therefore, cannot rely on the information contained in paragraph 4 of June Chan Suet Lai's affidavit.

I agree with Mr. Puthucheary that on the above ground alone the whole of the said affidavit should be struck out.

If am wrong in arriving at such conclusion, I shall next proceed to consider the paragraphs referred to in the application.

At the hearing of the application, Mr. Puthucheary did not proceed against paragraph 16 as he found that paragraph was not objectionable. He however proceeded to argue that paragraphs 17 and 18 be struck out. The two paragraphs are reproduced below:

> 17. Equally, in accordance with the Reconstruction Scheme of 1977, no express reference was made by the vendors to the asset arising out of the plantation operations in the form of the WMC or to tax-liabilities which the 6 SDN BHDS subsequently undertook to assume and in fact effected payment on Excess Profits Tax to the Malaysian Inland Revenue with a remission of Real Property Gains Tax. (A copy of the KGSB's letter of 17 October 1985 is enclosed and marked as Exhibit 'LCW-1'.)
>
> I am advised and verily believe that the Vendors, namely, the 10 UK LTDS, should have known in law and in fact that WMC amounting in the collective sum of RM10,109,127.60, was an asset with effect from the introduction of the ACT, namely, with effect from 1 January 1968, and would become due and payable 20 years thereafter, namely, on 1 January 1988.

Mr. Puthucheary submitted that paragraph 17 referred to events subsequent to the agreement.

He said that the Court should not look at any events after the contract. He then referred to KGSB's letter dated 17 October 1985, which was marked as exhibit "LCW-1". He contended that "LCW-1" should not be admitted as it was written eight years after the agreement.

Mr. Robert Lazar, Counsel for the respondents conceded that the letter, "LCW-1" was written subsequent to the agreement but contended that it was an item closely connected with the reconstruction scheme.

With respect, I agree with Mr. Puthucheary's submission. In *James Miller & Partners Ltd. v. Witworth Street Estates* [1970] AC 61, the House of Lords decided that a contract could not be construed by reference to the subsequent conduct of the parties. In that case Lord Reid said at page 603:

> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed but by reason of subsequent events meant something different a month or a year later ...

With regard to paragraph 18, Mr. Puthucheary submitted that the use of the words "I am advised and verily believe" in that paragraph contravened O. 41 r. 5. He also said that the paragraph contained heresay evidence. He submitted that in the present case, the proceeding was not an intelocutory matter. It was a final matter. He cited *Rossage v. Rossage & Ors.* to support his submission. He further said that the deponent did not give the source of the "advice" in that paragraph.

Mr. Robert Lazar submitted that paragraph 18 should be read together with pragraphs 19 and 20. He said that the applicants did not object to paragraphs 19 and 20. According to him in paragraph 20, reference was made to several letters written by the Department of Inland Revenue, Malaysia which were exhibited as "LCW-2(a)", "LCW-2(b)", "LCW-2(c)", "LCW-2(d)", "LCW-2(e)" and "LCW-2(f)". The same paragraph also referred to a letter written by the deponent to the Department of Inland Revenue and was exhibited as "LCW-3". Mr. Lazar said, that the source of the "advice" was contained in exhibits "LCW-2(a)" to"LCW-2(f)". He also said that paragraph 18 did not contain an opinion of the law.

In my opinion, when the deponent said in paragraph 18 that he was "advised and verily believed" he had not disclosed the source of his information or the persons who advised him and therefore the averment in paragraph 18 is bad. See *Hari Singh* case, *supra*. Paragraph18 contains hearsay evidence.

In *Rossage v. Rossage supra*., the English Court of Appeal decided that where the proceeding was not an interlocutory proceeding heresay evidence was inadmissible and irrelevant. In the present case the proceeding was not interlocutory but a final matter and heresay evidence is therefore inadmissible.

I shall next consider paragraphs 21 to 32. The paragraphs state:

> 21. I am advised and verily believe that the transfer of the Malaysian estates of the 10 UK Ltds pursuant to the NEP was intended to be in accordance with representations made to the Foreign Investment Committee (hereinafter referred to as "the FIC") for approval and include the WMC that had accrued and enured to the benefit of the 6 Sdn. Bhds. as transferees of assets attributable to the Estate as a going concern in Malaysia.
>
> 22. The aforesaid intention was manifest in the submission made by Partanian Baring Sanwa Multinational Berhad (hereinafter referred to as "PBS") to the FIC on 30 September 1976 i.e. prior to the execution of the 10 First Agreements by the 10 UK LTDS and the 6 Second Agreements executed by the 6 Sdn. Bhds whereby the plantation interests in Malaysia were to be transferred to the 6 Sdn Bhds in compliance with the NEP.
>
> 23. A copy of the submission of PBS to the FIC dated 30 September 1976 is enclosed and marked as Exhibit "LCW-4".
>
> 24. Immediately following the submission of PBS (Exhibit "LCW-4" refers) to FIC, the then Chairman of the Guthrie Group of Companies wrote to the Director General of Inland Revenue stating, *inter alia*, that technically the assets of the existing companies i.e. the 10 UK LTDS will, in the first instance, be notionally transferred to plantations i.e. GMP, and immediately thereafter, on the same date, to the 6 Sdn. Bhds., the actual transfer deed being made directly to the 6 Sdn. Bhds. (A copy of the aforesaid letter dated 8 December 1976 is enclosed and marked as Exhibit "LCW-5".)
>
> 25. The Director General of Inland Revenue in a letter dated 15 January 1977 in reply set out his views with particular reference to a Bank Guarantee in terms as contained in Exhibit "LCW-6" as enclosed and marked herein.

26. In connection with taxes payable by the companies i.e. 10 UK Ltds, following the Guarantee furnished by the transferee companies i.e. the 6 Sdn Bhds, the Director General of Inland Revenue stated that the distribution of the assets of the companies should be in accordance with the scheme of reorganisation which has been approved by the FIC. (A copy of the said Guarantee of 24 January 1977 and the said letter of the Director General of Inland Revenue of 25 January 1977 are enclosed and marked as Exhibits "LCW-7" and "LCW-8" respectively.)

27. The acquisition of shares by Permodalan Nasional Berhad (hereinafter referred to as "PNB") of GCL on the London Stock Market in 1981 necessitated the Submission to the FIC by PNB for the proposed reorganisation of GCL wherein it was expressly stated that the intention underlying the proposal was that PNB should own the Guthrie plantation interests in Malaysia directly through a Malaysian holding company (KGSB).

28. A copy of the said Submission by PNB is enclosed and marked as Exhibit "LCW-9".

29. Notwithstanding that the quantum of WMC as due and payable was known or ought to have been known to the Vendors, the said WMC was not specifically referred to or disclosed in the sale agreements following the transfer of all interests attributable to the Malaysian Plantations as set out in Exhibits "KBS-1" and "KBS-2".

30. The said WMC arose directly out of the plantation operations of the 10 UK LTDS and constituted the plantation interests and assets within the contemplation of the proposed reconstruction and as evidence in the representations made to the FIC.

31. By the terms of the Assets Sales Agreements between GMP and the 6 SDN BHDS, all book debts pursuant to paragraph 5 of Schedule 1 of the said Agreements due to the estates immediately prior to the acquisition by the Vendors were to be transferred to the 6 Sdn. Bhds.

32. I am advised and verily believe that the WMC constituted a book debt due and would have been entered into the books when it became payable in January 1988 by the Malaysian Inland Revenue pursuant to paragraph 109 of Schedule 9 of the Act.

Mr. Puthucheary submitted that the averment in paragraph 21 contravened O. 41 r. 5 as it did not contain the personal knowledge of the deponent. The deponent failed to disclose the source of the "advice." Mr. Puthucheary added that the paragraph also contained an intention.

Mr. Robert Lazar submitted that paragraph 21 should be read together with paragraphs 22 and 23. He said that the intention underlying the reconstruction scheme was admissible . According to him " intention" was a relevant factor to be taken into consideration.

I have already said that where the deponent failed to disclose the source of the advice, the averment was bad. With regard to the question of intention, it is my view that intention is not relevant to the present case. See **Halsbury's Laws of England,** 4th Edn., Vol. 12 pp. 612 and 613. In *Prenn v. Simmonds* [1971] 1 WLR 1381, the House of Lords decided that in construing a written agreement, evidence of negotiations or of the parties' intention ought not to be received by the Court. See also *Codelfa Construction Proprietary Limited v. State Rail Authority of New South Wales.* [1981 - 1982] 149 CLR 337 pp. 347-352.

Paragraph 22 also refers to "intention" prior to the execution of the agreements. It is therefore not relevant to the present case. The paragraph also refers to representation. Mr. Robert Lazar said that the representation was not evidence of negotiation.

Mr. Puthucheary on the other hand submitted that representation should be what the parties meant when they signed the agreement. I agree with the latter's submission .

Paragraph 23 refers to submission of PBS to FIC which is exhibited as "LCW4". The exhibit *inter alia* states:

> ...We write on behalf of The Guthrie Corporation Limited ("GCL") and its subsidiaries.
>
> GCL proposes to reconstruct its plantation interests in Malaysia in accordance with the New Economic Policy. The proposed scheme of reconstruction was submitted to the Foreign Investment Committee ("FIC") under our letter dated 5 May 1976, two copies of which are enclosed. Following our meeting on 4 September, 1976 between FIC and representatives of GCL and ourselves, FIC approved the proposed scheme. The Committee's letter of approval of 8 September, 1976 (Reference (21)dlm BPE 3/1/26) was copied to you.
>
> Our letter to FIC of 5 May 1976 stated (on page 4) that the application was conditional on GCL being satisfied that no transfer in the Scheme will be chargeable under the provisions of the Real Property Gains Tax Act 1976 ("the Act"). This condition was discussed at the meeting on 4 September 1976 and it was

suggested that we should write directly to you to seek exemption of the proposed scheme from Real Property Gains Tax ("RPGT"). This suggestion was confirmed under paragraph 3 of FIC's letter of 8 September 1976 .... Therefore, liability to RPGT might be deemed to arise:

(1) on the transfer of real property by the liquidators of the eleven companies to Guthrie Malaysian Plantations Sdn. Bhd. ("Plantations");
(2) on the transfer of real property by Plantations and Chemara Research Sdn. Bhd. to the six new Malaysian companies (referred to in our letter to FIC as "the SBs") and to Kumpulan Guthrie Sdn. Bhd. ("KGSB");
(3) on the transfer of shares in the six new Malaysian Companies ("the SBs") and in KCSB to Guthrie Ropel Berhad;
(4) on the liquidation of Plantations, and, should the SBs be liquidated after (3) above, on the liquidation of the SBs.

The proposed reorganisation is being undertaken by GCL in order to comply with the New Economic Policy in relation to its substantial plantation interests. As such the proposal was welcomed by FIC in paragraph 1 of their letter of 8 September 1976. It is not being undertaken in order to realise the assets of the companies involved in the reorganisation, and the transfers which may be chargeable to RPGT would not take place except for the purpose of implementing the New Economic Policy.

It will be noted that under the initial stages of implementing the scheme there is no transfer of assets outside wholly owned subsidiaries of GCL. In the latter stages there will be disposals of shares to the public in order to increase Malaysian, and in particular, Bumiputra participation in GCL's plantation interests. We are sure that it was not intended that such schemes, once approved by FIC, should come within the scope of RPGT, and suggest that it would be inequitable if they were to do so...

Sgd/-
Andrew M. Smith,
Penasihat.

Mr. Nadkarni, who was also Counsel for the applicants, submitted in reply that the above exhibit was hearsay. He cited *Sim Tien Bee v. Public Prosecutor* [1973] 2 MLJ 201 where it was decided that the ship's manifest was inadmissible in evidence without the master or officer responsible for it being called to prove its contents. I agree with Mr. Nadkarni's submission. See *Nahar Singh v. Pang Hon Chin* [1986] MLJ 141 @ 143. See also The **Supreme Court Practice**, 1988, Vol. 1, p. 652 para 41/5/1.

Paragraphs 24, 25, 26, 27 and 28 are based on documents namely "LCW-5" and "LCW-6, "LCW-7", "LCW-8", "LCW-9". "LCW-5" reads as follows:

Ketua Pengarah, 8 December 1976.
Hasil Dalam Negeri,
Bangunan Suleiman
Kuala Lumpur

(For the attention of Mr. Lee Beng Fye).

Dear Sir,,

G.C.L. - Reorganisation

I should first like to thank you and Encik Rashid for agreeing to meet me and the company's advisers to discuss:

(1) the undertakings required to be given in respect of tax payable by the companies which will be going into liquidation as part of the scheme of reorganisation; and
(2) the question of liability in respect of plantation charges on transfers of assets from the existing companies to their successors (the SBs).

I am pleased to note that you are prepared to give further consideration to the decisions as conveyed in your letters of 4th and 20 November 1976.

(1) Undertakings by SBs

We explained to you that the scheme of reorganisation contemplated that the assets would be transferred to the SBs on the same day that they are transferred from the existing companies to Plantations. We agreed that if you should so require, Plantations would become a party to the undertaking to be given to the Revenue. The undertakings by Plantations and the SBs would become effective as soon as the assets are transferred; up till that moment there is no change from the present position.

We also explained that we have had to adopt this scheme of arrangement in order to avoid the U.K. capital gain tax implications of any other forms of arrangement.

I should like to mention that past practice of the companies involved has been to, provide your Department with an estimate of the chargeable income for a year of assessment and to make arrangements to pay tax by instalments. In respect of tax due for the year of assessment 1977, a

similar procedure will be adopted, with Plantations and SBs undertaking to pay the instalments agreed to by your Department.

In the light of the above, I hope you will be able to agree to accept a joint and several undertaking by Plantations and the SBs (and KGSB in respect of Chemara) to meet the tax liabilities of the existing companies as sufficient to authorise the Liquidators to distribute their assets in the manner proposed in the scheme of reorganisation.

(2) Plantation Charges

As already mentioned above, the scheme of reorganisation was designed to overcome potential capital gains tax problems in the U.K. Technically, the assets of the existing companies will, in the first instance, be notionally transferred to Plantations and immediately thereafter, on the same day, to the SBs; the actual transfer deeds being made directly from the existing companies to the SBs.

You indicated during the meeting that if Plantations were to trade for a period of time of say one month, the Rule 6 of the Income Tax (Capital Allowances & Charges) Rules, 1969, will not apply and that no plantation charge will be made.

However, as the assets of the Limiteds are to be transferred directly to the SBs, I would be obliged if you would agree that the notional transfer through Plantations can be ignored and that you would not seek to impose a plantation charge on the existing companies when they transfer their assets through Plantations to the SBs.

The alternative of Plantations trading for one month, as you will appreciate, would involve considerable administrative and accounting complications and expenses. For example several hundred operating licences would have to be duplicated as would accounting procedures, and notices to nearly twenty thousand employees, etc.

As you know, the Gurthie Corporation is anxious to obtain all necessary consents and approvals to implement the reorganisation proposals as early as possible. I would appreciate it therefore if you could let us have your agreement to the above.

Yours faithfully,

Sgd/- M.J. Gent
Chairman.

a LCW-6" reads as follows:

The Chairman,
Kumpulan Guthrie Holdings Sdn. Bhd.,
Wisma Guthrie,
P.O. Box 2677,
Kuala Lumpur 01-02.

b Tuan,

G.C.L. - Reorganisation

With reference to your letter of 8 December 1976, I regret I am unable to agree to the proposed undertakings by 'Plantation' and the SBs' for settlement of 1977 and 1978 tax liabilities of each of the 11 companies which will eventually be liquidated as *c* part of the scheme of reorganisation. However, if the Liquidator is able to provide an adequate bank guarantee to meet the full liabilities of the above companies consideration can be given to release him of his obligation under s. 75(2) of the Income Tax Act 1967.

d As regards plantation charges, I am able to confirm that on the information so far available including that conveyed to me by Tacs Sdn. Bhd. in their letter 12 January 1977, the proposed reorganisation can be accepted as an arrangement coming within the ambit of paragraphs 38 to 40, Schedule 3, Income Tax Act 1967 and the Income Tax (Capital Allowances and Charges) *e* Rules 1969 will therefore apply. Accordingly, no plantation charges will be imposed on the various transferor companies provided that all the assets are transferred at their book values from the 11 companies direct to the 'SBs' and that such transfers are authorised by way of a resolution.

f Yang benar,

Sgd/-
(Lee Beng Fye)
Pmg. Tim. Ketua Pengarah
Hasil Dalam Negeri,
Malaysia.

g c.c. The Director,
Tacs Sdn. Bhd.,
Suite 4018, President House,
Jalan Imbi,
Kuala Lumpur 06-23."

h Mr. Puthucheary submitted that the agreements were being construed by various letters including the two letters reproduced above. He submitted that the Court should construe the agreement and only take matrix of facts at the time of the signing of the agreement. He further submitted that the applicants were not a party to the letter "LCW-5" and therefore the letter *i* was irrelevent. He also said that the Department of Inland Revenue was not a party to the

second agreement and therefore it did not concern the applicants.

Mr. Putchucheary also asked the Court to strike out the letter "LCW-6". He said the letter was written by the Department of Inland Revenue to Kumpulan Guthrie. Paragraph 1 of the letter had nothing to do with the credit. When the letter was written, the money had already been paid ten years earlier.

Mr. Puthucheary also referred to a guarantee dated 24 January 1977 ("LCW-7") and to a letter from the Department of Inland Revenue dated 25 January 1977 ("LCW-8"). He submitted that the guarantee was in relation to some other matter. He next referred to "LCW-9" which was dated 11 October 1982. He submitted that "LCW-9" was written five years after the date of the agreement. He asked the Court not to look at subsequent events. He added that in "LCW-9" Permodalan Nasional Berhad could not offer an opinion when it was not the owner of the plantation in 1975.

Mr. Robert Lazar contended that paragraphs 24 should be read together with paragraphs 25 and 26. He said these matters were related to the implementation of the reconstruction scheme. They occurred around the time the agreement was signed. According to him reconstruction involved not only FIC but also the Department of Inland Revenue. He said that the Court, when looking at the agreements had to see the intention with regard to the passing of the assets. No opinion was involved. According to him the reconstruction was still an on going matter.

Mr. Nadkarni, in reply, said with regard to paragraphs 24, 25 and 26 the respondents were implying further terms of "plantation interests."

I agree with the submissions of Mr. Puthucheary and Mr. Nadkarni that paragraphs 24 and 25, 26,27 and 28 and the documents exhibited thereto should be struck out.

With regard to paragraph 30, Mr. Puthucheary sumitted that the paragraph contained extrinsic evidence to the two agreements and was not admissible. Mr. Robert Lazer said that paragraphs 29 and 30 contained a contention. Mr. Nadkarni in reply said that an affidavit was not a place for submission.

I agree with Mr. Puthucheary's submission that the paragraph contained extrinsic evidence and I hold that it is inadmissible. Mr. Robert Lazer's argument that paragraphs 29 and 30 contained a contention is not acceptable. In *Alfred Dunhill & Anor. v. Sunoptic SA and Anor*, [1979] FSR 337. Roskill LJ in his judgment at page 352 said:

> I hope it is not out of place to say at this stage that the affidavits filed on both sides are in at least two cases very much too long. Affidavits are designed to place facts, whether disputed or otherwise before the tribunal for whose help they are prepared. They are not designed as a receptacle for or as a vehicle for legal arguments. Draftsmen of affidavits should not, as a general rule, put into the mouths of the intended deponents legal arguments of which those deponents are unlikely ever to have heard. Legal arguments, especially in interlocutory proceedings, should come from the mouths of those best qualified to advance them and not be put into the mouths of the deponents. There has been much unnecessary paper in this case brought about by the inclusion of legal arguments in affidavits.

Mr. Puthucheary referred to the exhibit, "LCW-10" and said he did not know who prepared the document at page 156. I have seen the document, and I find that it is not known who was the author of the document. In my view the Court should not consider the said document.

Paragraph 32 contains the phrase "I am advised and verily believe ..." The deponent had not stated the source of the information or source of his "belief." Paragraph 32 is therefore inadmissible.

I shall next consider paragraphs 34 and 35 which state as follows:

> 34. I am advised and verily believe that WMC arising out of the Malaysian plantation operations was clearly included as part of all other assets attributable to the estates.
>
> 35. In this regard, the views of professional advisers were sought, namely Price Waterhouse Tax Services Sdn. Bhd. and Peat Marwick Mitchell and enclosed are their opinions marked as Exhibits "LCW-10" and "LCW-11 respectively.

It is to be noted that paragraph 34 also contains the phrase "I am advised and verily believe" without disclosing the source of the information or the source of the belief.

Paragraph 35 refers to the views expressed by accountants as contained in exhibits "LCW-10" and "LCW-11". Exhibit "LCW-10" contains the

opinion of the accountants. One of the documents in "LCW-10" is a letter written by Price Waterhouse Tax Services Sdn. Bhd., on 28 February 1985, which states *inter alia:*

> We are of the view that the West Malaysian Credit of each of the Limiteds did not pass to GMPSB since the proviso to paragraph 109(1) of Schedule 9 to the Income Tax Act (ITA) did not apply, the transfer of the assets and liabilities not having taken place at or about the time of dissolution of the companies. The Limiteds have in fact not been dissolved. We would consider that there is a distinction between liquidation and dissolution of a company for the purpose of a claim to the company's WMC having regard to paragraph 110 of the same Schedule which provides that -
>
> > ...where the Director General is satisfied that the dissolution of a company is imminent and that the company will be entitled on its dissolution to the West Malaysian Credit, he may make the amount of the West Malaysian Credit available to the liquidator of the company; and, if the company is not dissolved within three months (or such longer period as the Director General may consider reasonable in the circumstances) after the making available of that amount to the liquidator, it shall be the duty of the liquidator to return that amount to the Director-General upon being called upon to do so.
>
> The WMC therefore remains with the Limiteds and would be paid to them on the occurrence of such one of the following events as first occurs in relation to the companies, i.e.
>
> (a) on 1 January 1988;
> (b) on their dissolution;
> (c) on the companies satisfying the Director General that they cease to have income (other than dividends) derived from Malaysia in the basis year for a year of assessment, that they were not resident for that basis year or for a year subsequent thereto and that they are not likely to have any income (other than dividends) derived from Malaysia in any of the two years following that basis year, or as the case may be, that subsequent year.
>
> Since the scheme of reconstruction provides for the transfer of the assets and liabilities (and these assets subject to confirmation by your legal advisers that they include the WMC) of the Limiteds to GMPSB and thereafter to the SBs, the WMC would ultimately end up in the books of the SBs. The WMC funds would then be available for distribution by way of dividends since the SBs we also understand have sufficient section 108 credit to frank the dividends.

Exhibit "LCW-11" is a letter written by Peat, Marwick on 15 June 1987. The following paragraphs in that letter contain an opinion of law:

> In considering the ownership of the WMC, we have to look into the entitlement within Schedule 9 of the Income Tax Act 1967 as well as the beneficial ownership.
>
> KGSB has sought legal opinion on whether the transfer of assets and liabilities included the WMC and we are given to understand that the transfer of the assets and liabilities did include the WMC, although this was not specifically mentioned in the agreements dated 31 January 1977.
>
> Clause 2 of the agreement states that the undertaking which consists of the specified assets in Schedule 1 is transferred on a going concern basis. An undertaking carried on a going concern basis should include the WMC. It is a generally accepted accounting principle not to recognise WMC as an asset in the accounts.

The above exhibits clearly state an opinion of law. Mr. Puthucheary rightly submitted that opinion of law was not admissible. I agree with him. It is the function of the Court to decide on questions of law. In *Development Commercial Bank Berhad v. Cheah Theam Swee* [Civil Suit No. C2575 of 1984] (Unreported), I said:

> The question that arises now is whether the opinion on point of law as contained in H9 is admissible for the purpose of the present application. Order 41 rule 5 of the Rules of the High Court, 1980 clearly states that - (1) '... an affidavit may contain only such fact as the deponent is able of his own knowledge to prove' and (2) 'An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.'
>
> In my opinion, the letters H8 and H9 do not come within the meaning of O. 41 r. 5. The two letters are irrelevant and inadmissible. Under O. 41 r. 6, the Court may order to strike out 'any affidavit any matter which is ... irrelevant ...' In *Gleeson v. J Wippell & Co. Ltd*. Megarry VC, in his judgment at p. 519 said:
>
> > The plaintiff's affidavits avoid these defects of form, though only partially as to RSC O. 41, r. 9(5) but one of them displays undesirable features that I

> think ought not to be allowed to pass unchecked. In Mr. Brown's affidavit he quotes a passage from an opinion of a silk, and he exhibits an article in a journal concerned with patents. The object appears to be to demonstrate that the plaintiff has prospects of success against Wippell if her action is not halted. The main objection to the extracts from the article is that they do not appear to me to constitute any evidence; and the prupose of affidavits is, or should be, to provide evidence. As I told Mr. Jacob, I would listen with pleasure to any submission upon the subject that he chose to put before me, whatever his source of inspiration, but I would not listen to the words of a Queen's Counsel, however eminent, or the author of an article, when proffered as evidence of the legal rights and prospects of a litigant. A Court does not hear expert evidence on what the law of England is, or what the rights of parties are under that law. In any case, extracts from counsel's opinion are usually valueless, or worse, without the rest of the opinion and the instructions on which it was based, to show what the opinion was founded on and what reservations and qualifications there are.

I agree with the passage quoted above.

In *Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors.* [1989] 1 MLJ 426 Shankar J said at page 437:

> As to the weight to be accorded to the views of the persons involved on the legality of the transaction, Mr. Palasuntharam drew the Court's attention to *Gleeson v. J. Wippell & Co .Ltd*. where Megarry VC said at p. 519 that affidavits should not include a passage from an opinion of a Queen' s Counsel or exhibit an article by a learned author as evidence of the legal rights or prospects of a litigant. The reason is obvious. What the law of Malaysia, is or what the rights of parties are under that law when the interpretation of that law, or the rights thereunder are disputed is a matter which has to be resolved by the Courts.

In *Pioneer Shipping Ltd. & Others v. B.T.P. Tioxide Ltd*. [1982] AC 724 Lord Diplock said at page 736 as follows:

> Of course the dispute involves some question of law. It is difficult to conceive of a dispute under a charterparty that does not do so. The dispute is likely to be about what the parties have agreed shall be their respective legal rights and obligations in events that have actually happened or, it may occasionally be, in events that it is anticipated may happen. The answer must depend upon the true construction of the agreement between the parties; and in English jurispurdence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law. The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed. In the case of a 'one-off contract' where the exact combination of words and phrases that fall to be construed has not only never been used before and so did not possess an already established meaning of which each party was entitled to assume the other knew when he entered into the contract, but is also unlikely to be used in future by any other parties, it is not self-evident that an arbitrator or arbitral tribunal chosen by the parties for his or their experience and knowledge of the commercial background and usages of the trade in which the dispute arises, is less competent to ascertain the mutual intentions of the parties than a judge of the Commercial Court, a Court of Appeal of three Lords Justices or even an Appellate Committee of five Lords of Appeal in Ordinary. A lawyer nurtured in a jurisdiction that did not owe its origin to the common law of England would not regard it as a question of law at all. This, I believe, was all that Lord Denning M.R. meant to convey by his vivid, if somewhat less than tactful, phrase; 'On such a clause, the arbitrator is just as likely to be right as the judge - probably more likely' [1980] Q.B. 547, 564G). Nevertheless, despite the disappearance of juries, literate or illiterate, in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being 'a question of law' for the purposes of judicial review of awards of arbitrators or decisions of administrative tribunals from which an appeal to a court of justice is restricted by statute to an appeal upon a question of law.

The other paragraphs referred to in the application are paragraphs 37 to 41. The paragraphs state:

> 37. In order to clarify and determine the proper recipient of the WMC, the matter was referred

to the Department of Inland Revenue, Malaysia whose opinion and report under cover of a letter of 18 June 1985 is enclosed and marked as Exhibnit 'LCW-12'.
38. In the said letter of the Inland Revenue, the Deputy Director General advised that a reference be made to the FIC which was the approving authority for the entire scheme of reconstruction.
39. Accordingly, the matter was referred to the FIC which in its letter of 20 August 1985 confirmed that the transfer of the assets and liabiIities to GMP and their subsequent sale thereof to the 6 SDN BHDS in Malaysia included the WMC. (A copy of the said letter is enclosed and marked as Exhibit 'LCW-13'.)
40. This view was equally confirmed by the Ministry of Finance with a letter of 16 December 1985, a copy of which is enclosed and marked as Exhibit 'LCW-14'.
41. I am advised and verily believe that the WMC due to the 10 UK LTDS constituted the integral part of the assets attributable to the estates as envisaged in the Reconstruction Scheme and in the respective Agreements for the sale of assets of the 10 UK LTDS to the 6 SDN BHDS and should, accordingly, be due and payable to the 6 SDN BHDS.

Mr. Puthucheary submitted that paragraphs 37 to 40 contained opinion of law and should be struck out.

Paragraph 37 refers to an opinion of the Department of Inland Revenue as contained in exhibit "LCW- 12" which states:

Ketua Setiausaha Perbendaharaan,
Bahagian Cukai,
Kementerian Kewangan,
Khazanah Malaysia,
Jalan Duta,
Kuala Lumpur

Tuan,

West Malaysian Credits
Guthrie Group of Companies.

Adalah saya merujuk kepada surat tuan yang bertarikh 16 Mei 1985.

The issue of the ownership of the West Malaysian Credits (WMC) of the 10 'Limiteds' has been duly studied by this Department in the Report herein attached.

On balance, it is the considered opinion of this Department that a proper construction of the existing provisions yields the conclusion the transfer of the assets from the 10 Limiteds to the 6 SBs (via Guthrie Malaysian Plantations Sdn. Bhd.) did not take place 'at or about the time of dissolution'. Hence the WMC did not pass on to the transferee companies but instead remained with the Limiteds.

However, in view of the fact that the 6 SBs effectively took on all the assets and liabilities of the Limiteds, this Department is of the view that whilst the Limiteds may be the claimants of WMC, the ultimate beneficiaries of the said credits should be the SBs. In this connection perhaps the Foreign Investment Committee, being the approving authority for the entire scheme of reconstruction, is best placed to consider and confirm the question of the ultimate beneficial ownership.

Sekian.

"Berkhidmat Untuk Negara

Saya yang menurut perintah,

Sgd/-
(S. Sivalingam)
Timbilan Ketua Pengarah Hasil Dalam Negeri,
Malaysia.

Paragraph 39 referred to exhibit "LCW-13". The exhibit contains a document which is reproduced below:

Secretary-General
Tax Department,
Ministry of Finance,
Khazanah Malaysia,
Jalan Duta,
KUALA LUMPUR.

Dear Sir,

WEST MALAYSIA CREDIT OF 10 UK LIMITED COMPANIES OF GUTHRIE CORPORATION LIMITED.

I have been directed to refer to the above and inform you that when the Foreign Investment Committee evaluated and approved the proposal to restructure the plantation interests of Guthrie Corporation Ltd. in Malaysia in 1976, it was its understanding that the assets and liabilities of the 10 Limiteds transferred to Guthrie Malaysian Plantation Sdn. Berhad and subsequently sold to the six private companies in Malaysia, included the West Malaysia Credit.

Sgd/-
(Raja Dato' Seri Jaafar B. Raja Musa)
Secretary
Foreign Investment Committee.

Paragraph 40 refers to exhibit "LCW-14". The exhibit is a letter by the Ministry of Finance dated 16 December 1985.

Pengurus Besar,
Permodalan Nasional Berhad,
201-A, Balai PNB
Jalan Tun Razak
50400 Kuala Lumpur.

Tuan,

West Malaysian Tax Credit of 10 UK Limited Companies of Guthrie Corporation Ltd.

I refer to the above for which I have been directed to inform you that the proposal to restructure the plantation interests of Guthrie Corporation Ltd. in Malaysia and approved in September 1976, called for the transfer of all assets and liabilities of the 10 Limited Companies to Guthrie Malaysian Plantations Sdn. Bhd. and, upon their liquidation, these assets and liabilities were to be sold to six private companies in Malaysia.

With regard to the above, I wish to confirm that the transfer of the assets and liabilities to Guthrie Malaysian Plantations Sdn. Bhd. and their subsequent sale thereof to the six private companies in Malaysia, included the West Malaysian Credit.

Berkhidmat Untuk Negara.

Saya yang menurut perintah,

Sgd/—
Halimah Binti Haji Sulaiman
Bahagian Cukai,
b.p. Ketua Setiausaha Perbendaharaan.

It is to be noted that the above documents found in exhibits "LCW-12", "LCW-13" and "LCW-14" as quoted above contain opinion of law. As stated earlier opinion of law is not admissible in an affidavit. See *Development and Commercial Bank v. Cheah Theam Swee*, *supra*; and *Pioneer Shipping v. Tioxide supra.*

In paragraph 41, the deponent again said, "I am advised and verily believe ..." He did not state who advised him or what was the source of the advice. Mr. Puthucheary argued that if it was his solicitor who advised him his solicitor should file an affidavit.

Mr. Robert Lazar said that paragraph 41 contained a contention. I agree with Mr. Nadkarni when he said that an affidavit was not a place for submission. See *Alfred Dunhill v. Sunoptic, supra.*

For the reasons stated above I made an order in terms of the application (excluding paragraph 16 of the said affidavit).

KOTA TRANSPORT AGENCY SERVICE (SUING AS A FIRM)

v.

SEAH BROTHERS MOTOR (SUED AS A FIRM)

HIGH COURT, ALOR SETAR
TUAN MOHD NOOR BIN HAJI ABDULLAH J.
[CIVIL SUIT NO: 191 OF 1974]
29 JANUARY 1994

PRACTICE & PROCEDURE: Appeal against assessment of damages by SAR - Whether SAR's finding of fact erroneous - Acid test of probabilities and improbabilities - Principle of mitigation.

The case before the Court was an appeal against the decision of the learned Senior Assistant Registrar (SAR) in assessing damages pursuant to an order of Court dated 16 September 1978. Damages were assessed under two items namely:

(i) loss of use of lorry; and
(ii) post delivery cost of repair.

The learned Judge in his written judgment had found that, "the detention of the lorry after repairs and the refusal to allow its delivery to the plaintiff company was not because of RM21.90 still unpaid ... The position was such that had the plaintiff company tendered the balance of RM21.90 they would not have obtained the release of the motor lorry by the defendant company unless the whole amount was paid." Furthermore, the learned Judge was of the opinion that the defendant company had no lien on the motor lorry in question.

The SAR awarded RM400 under the first item finding that "the whole incident was due to a dispute over the balance of the repair price of RM21.90" and that the plaintiff should have tendered payment of RM21.90 to redeem the lorry. The SAR awarded RM1,000 for the second item holding that had the plaintiff made prompt payment the defendant would have released the lorry thereby minimising the state of disrepair.

Held:

[1] The SAR was in grave error. His findings were surmised on a premise contradictory to the findings of fact of the learned Judge. After evaluation of the SAR's written judgment the Court found that his erroneous finding of fact